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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92042082
Party	Defendant International Gold Star Trading Corp.
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Attachments	5060-2L Registrant's Reply Brief re Evidentiary Objections.pdf (9 pages (365584 bytes)

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FOUR SEASONS DAIRY, INC.,	:	Cancellation No. 92/042,082
	:	
Petitioner,	:	
	:	Mark: BABUSHKA'S RECIPE
v.	:	
	:	Reg. No. 2,479,287
INTERNATIONAL GOLD STAR	:	
TRADING CORP.,	:	
	:	
Registrant.	:	
	:	

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REGISTRANT'S REPLY TO PETITIONER'S OPPOSITION TO REGISTRANT'S

EVIDENTIARY OBJECTIONS

In connection with its Reply Trial Brief, Petitioner included an "Appendix A" which purported to oppose Registrant's motion to exclude certain of Petitioner's proffered evidence, and also purported to be a "rebuttal" to registrant's opposition to Petitioner's own motion to exclude evidence proffered by Registrant. As explained below, it is believed that the "rebuttal" is improper and should be ignored, but, if it is considered, Registrant requests that it be given leave to submit a sur-reply and encloses that proposed sur-reply herein.

Registrant's Reply to Petitioner's Opposition Regarding Registrant's Motion to Exclude

Registrant's Motion to Exclude has two primary components: the testimony of Natalie Walewitsch and Petitioner's Exhibits 7-11. Each component will be addressed separately.

Testimony of Natalie Walewitch

Registrant has moved to exclude the testimony of Natalie Walewitsch since Ms. Walewitsch walked out of her deposition during cross-examination, thereby depriving Registrant the opportunity to complete its cross-examination. Petitioner does not deny that Ms Walewitsch walked out before cross-examination was completed. Petitioner instead argues that Registrant's cross-examination exceeded the scope of direct, without pointing to a single improper question or other basis for Ms. Walewitsch leaving the deposition. Registrant was denied the opportunity to complete a full and fair cross-examination, and so Ms. walewitsch's testimony should be excluded for the reasons given in Registrant's initial motion papers.

Petitioner argues that Registrant's principal, Ms. Galina Pincow somehow behaved improperly by attending the deposition and passing notes to counsel during the deposition. Ms. Pincow had every right to attend the deposition, and to communicate with counsel during the deposition. If there was to be any discussion of matters that were believed to be confidential, Ms. Pincow could have been asked to step outside and not hear such testimony, as was done during other depositions. However, Ms. Walewitsch did not ask for Ms. Pincow to be excluded and did not object to her presence, or even give that as an excuse for her departure. She just left.

Thus, Registrant was denied the opportunity to conduct a full and fair cross-examination of Ms. Walewitsch and her testimony must be excluded.

Petitioner's Exhibits 7-11

Registrant has moved for exclusion of Petitioner's Exhibits 7-11, which are substantially identical letters purportedly showing sales of products prior to the date of Petitioner's incorporation.

Exhibit 10 was purportedly signed by one Mark Gorelik who passed away before his testimony was taken. Petitioner attempts to bring in that document on the grounds that Petitioner's principal, Alexander Bekker, testified that he saw Mr. Gorelik sign the document and therefore it is admissible under Fed.R.Evid. 803(5) as past recollection recorded. However, Fed.R.Evid. 803(5) specifically states that the memorandum that allegedly records the past recollection may not itself be introduced into evidence.

Rule 803(5) reads:

"A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence *but may not itself be received as an exhibit* unless offered by an adverse party." (emphasis added)

Thus, by its express terms, Rule 803(5) prohibits the introduction of the memorandum (*i.e.*, Petitioner's Exhibit 10) itself. Thus, Exhibit 10 cannot be introduced into evidence. Further, it could only be used to refresh the recollection of the *witness* who, in this case, was Mr. Bekker, who could not attest to the supposed veracity of the facts which supposedly underlie Exhibit 10. Thus, Exhibit 10 must be excluded.

The arguments offered in the opening brief with respect to the remaining Exhibits to which objection was made will not be repeated, as they were not rebutted by Petitioner. For the reasons previously offered, therefore they should be excluded.

Registrant's Proposed Sur-Reply to Petitioner's Proffered Reply Brief Regarding Petitioner's Motion to Exclude Testimony and Evidence and/or Registrant's Reply to Petitioner's Motion for Exclusion of Evidence

In its opening brief, Petitioner moved to exclude certain evidence offered by Registrant as having been produced after the close of discovery. That motion consisted entirely of five lines of its brief (bridging pages 8 and 9 thereof) and lacked any specific reference to any item of evidence or testimony to which an objection was made, and Registrant presented in full its opposition to that motion, which opposition does not need repeating.

Petitioner, however has now offered a roughly twelve page "rebuttal" (more correctly, a "reply") to Registrant's opposition, in which, for the first time, Petitioner details the specific exhibits and lines of testimony to which objection has been made. Registrant has not had a fair opportunity to address the specific grounds put forth for the first time in the "rebuttal" and therefore moves either for leave to file a sur-reply to the late filed "rebuttal" or for the "rebuttal" to be stricken as untimely and improper.

The Board's rules generally disfavor the filing of a reply brief to a motion (T.B.M.P. §502.02(b)). For a reply brief to be considered, it must be filed within fifteen (15) days of the brief to which it is in opposition (*id.*), and that time may not be extended, 37 CFR § 2.127(a) ("The time for filing a reply brief will not be extended.") even by consent of the parties. *Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 U.S.P.Q.2d 2009 (T.T.A.B. 2002). Thus, the "rebuttal" may not be considered, as it is untimely and therefore barred by the Board's Rules.

Even if the Board were to find it has the discretion to consider the reply (which the T.B.M.P. states it does not), it should decline to do so, as the reply presented, for the first time,

arguments and specifics that should have been included in Petitioner's opening brief on the merits.

Thus, that portion of Appendix A to petitioner's Reply Trial Brief which constitutes its reply concerning its motion to exclude any testimony or evidence presented by Registrant should be stricken or otherwise not considered.

Alternatively, if the Board gives Petitioner the undeserved benefit of considering the untimely reply, then the Board should accept Registrant's following comments regarding the merits of Petitioner's motion as a form of sur-reply, even though the Board's rules preclude the filing of a sur-reply (T.B.M.P. § 502.02(b)), *No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1553 (T.T.A.B. 2000), so as to ensure that Registrant is given a full and fair opportunity to be heard on this motion.

This proposed sur-reply, if necessary and if accepted, will be brief.

First, Petitioner argues that the mere fact that certain documents were produced after the close of discovery renders them inadmissible. However, Rule 26, Fed.R.Civ.Pro., requires that discovery be supplemented "whenever" facts or evidence comes to light which renders prior discovery incorrect or incomplete. The Board has expressly ruled that this provision applies even to facts learned for the first time during trial. *Vignette Corp. v. Marino*, 77 U.S.P.Q.2d 1408, 1411 (T.T.A.B. 2005). ("[D]iscovery responses may be supplemented at any time, even during trial") "[Petitioner] thus finds itself in the curious position of requesting the imposition of sanctions for behavior that not only is not prohibited by the Federal Rules of Civil Procedure, but is required by them." *Marianjoy Rehabilitation Hosp. v. Williams Electronics Games, Inc.*, 1996 WL 411395, *3 (N.D.Ill. 1996). Thus, the mere failure to have produced the documents or information would not preclude reliance thereupon unless the documents or

information was available. For each document in Registrant's custody or control which was produced after the close of discovery an explanation was given for the late discovery (*see, e.g.,* Pincow deposition Vol. 1, page 39:16-41:9), a fact which was overlooked by Petitioner in its motion.

Petitioner does not attempt to address the uncontroverted facts surrounding the late discovery of the documents that were in Registrant's custody or control, and therefore the motion fails with respect thereto.

As to the documents which were in the possession of third party witnesses, such as those in the possession of Irina Lubenskaya or Lewis ("Butch") Miller, those documents were not in the custody or control of Registrant and therefore could not have been produced earlier than when they were given to registrant. Petitioner has made no effort to show that those documents could have been obtained by Registrant or that Registrant had the legal right to compel their production from the third parties. ("Control" is defined as "not only possession, but as *the legal right to obtain the documents upon demand.*"; *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 41 U.S.P.Q.2d 1161, 1166 (Fed. Cir. 1996)); emphasis added). The third parties from whom the documents were obtained were not employees of Registrant, or otherwise under legal obligation to produce documents "upon demand". They each had looked, to varying degrees of success, to find documents earlier and then, when called upon to testify, found more. They were available for examination as to the circumstances of their late discovery of the documents in question, and Petitioner has pointed to no basis for finding that they had given the documents to Registrant earlier than the date(s) on which those documents were produced to Petitioner, or for finding that they had any legal compulsion to produce documents "upon demand" of Registrant.

Thus, Petitioner has failed to make the case for its motion to exclude.

Second, Petitioner notes that all of Registrant's witnesses appeared voluntarily, and attempts somehow to argue that that makes the documents in their control actually under the custody or control of Registrant.. (Reply Brief, p. 7). Petitioner offers no basis, whether factual or legal, for concluding that this fact alone makes documents in the possession of third parties under the "custody or control" of Registrant. Furthermore it is noted that all of Petitioner's witnesses also testified without the need for a subpoena, and when counsel for Petitioner was questioned about the late production of documents during the deposition of Arkadiy Golub, he stated "he was not aware of any obligation" to produce those documents even though they had been in hid possession for well over a week and possibly as long as six months (Golub Dep., October 15, 2009; page 15:21-22). Thus, Petitioner has taken inconsistent litigation positions and should not be allowed to argue for the exclusion of evidence that was late produced from a third party who testified without subpoena while stating that he had no obligation to supplement information previously provided from a third party witness without subpoena.

Third, Petitioner has failed to identify any specific request for production or interrogatory to which the later produced documents were responsive. In its reply, Petitioner merely lists thirteen document requests and seven interrogatories to which the documents were allegedly responsive, without pointing to which request or interrogatory any specific document would have been responsive. It is pointed out that one of the document requests to which Petitioner points is Document Request No. 28, which calls for "all documents ... upon which Registrant intends to rely in connection with this cancellation proceeding." The Board, however, has repeatedly held that a party has no obligation to respond to such a request, *Charrette Corp. v. Bowater Comm. Papers Inc.*, 13 U.S.P.Q.2d 2040, 2041 (T.T.A.B. 1989), and so a party has no "right to complain" that documents were not produced in response thereto. Since Petitioner has identified

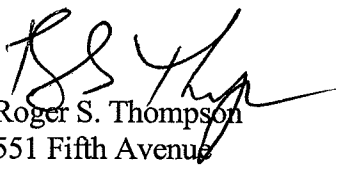
the request to which the documents were responsive as possibly being an improper request, it cannot be determined if that is the request that Petitioner believes should have been answered.

Thus for the additional reason that Petitioner, by its scattershot and imprecise objection, has not identified a single *proper* document request or interrogatory to which the objected-to documents were responsive, the motion should be denied.

For all these reasons, therefore, Petitioner's motion should be denied in its entirety, and all of Registrant's evidence should be admitted into evidence.

Respectfully submitted,
COHEN, PONTANI, LIEBERMAN & PAVANE

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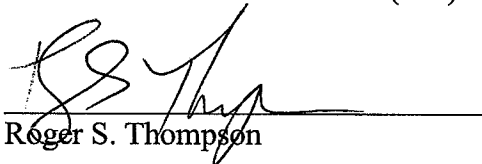
Dated: November 1, 2010

*Attorneys for Registrant,
International Gold Star Trading Corp.*

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Registrant's Reply to Petitioner's Opposition to Registrant's Evidentiary Objections in Cancellation Proceeding No. 92042082 entitled *Four Seasons Dairy, Inc. v. International Gold Star Trading Corp.*, was served by e-mail on counsel for Petitioner:

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November 1, 2010